Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Sponsorship Identification Rules and	)	MB Docket No. 08-90
Embedded Advertising	)	
	)	

To: The Commission

REPLY COMMENTS OF DEBMAR-MERCURY

Debmar-Mercury, LLC ("Debmar-Mercury"), by its attorneys, hereby replies to several comments filed in response to the Notice of Inquiry and Notice of Proposed Rulemaking[1] in the above-captioned proceeding. Debmar-Mercury is a worldwide production and distribution media company specializing in the distribution of video via syndication, cable, network, Video-On-Demand/Pay-Per-View and pay television. Debmar-Mercury also syndicates theatrical movies produced by Revolution Studios and Lionsgate.

Comments filed by a group of eighteen national media providers, including Debmar-Mercury, detail how existing sponsorship identification requirements adequately address public interest concerns with respect to embedded advertising in television programming and that the adoption of more restrictive rules would undermine the careful balancing of interests developed over decades of practice.[2] On the other hand, comments filed by certain public interest organizations and unions argue that dramatic and burdensome modifications to sponsorship identification requirements are necessary to protect the public. However, as demonstrated

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[1] *Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. 10682 (2008) (*"NOI/NPRM"*).

[2] *Comments of the National Media Providers*, MB Docket No. 08-90, filed on September 22, 2008 (*"National Media Providers Comments"*).

herein, the purported premises for these recommendations are not supported by the record in this proceeding, empirical evidence, or rationality, and implementation of these ill-conceived proposals would constitute regulatory overkill.

As discussed more specifically below, Debmar-Mercury opposes revisions to the sponsorship identification rules to require unnecessary, burdensome, and intrusive disclosure of "embedded advertising" as defined in the NOI/NPRM. Further, Debmar respectfully submits that the longstanding and carefully considered exemption applicable to theatrical films subsequently aired on broadcast television is even more appropriate today than when it was originally adopted.

I. Elaborate, Intrusive Disclosures are Unnecessary and Would Unnecessarily Degrade Television Programming Content.

As noted at the comment stage of this proceeding, "the Commission historically has avoided rules and policies that would undermine the economic foundation of advertiser-supported broadcasting."[3] Also emphasized in comments is the unrefuted fact that even though embedded advertising often falls within the "obviousness" exception to the sponsorship identification rules, the television industry voluntarily and regularly discloses sponsors of product placement and product integration in accordance with the current, demonstrably adequate sponsorship identification procedures.[4] Moreover, the record is bereft of any evidence that embedded advertising inflicts harm on what some commentators impliedly characterize as

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[3] *National Media Providers Comments* at 2 (citing Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946), *reprinted in Documents of American Broadcasting* 151, 224 (Frank J. Kahn ed., 2d ed. 1973) and 47 U.S.C. § 151); and see Comments of the National Association of Broadcasters at 19 (stating "The free over-the-air broadcasting business model is reliant on advertising to survive") ("*NAB Comments*").

[4] See Comments of Group M Worldwide at 2, *NAB Comments* at 7 (citing 47 C.F.R. § 73.1212(f)), Comments of The Progress & Freedom Foundation at 3-4.

an unsuspecting, non-discerning, easily persuaded public. Indeed, it is telling that the Federal Trade Commission, which has primary regulatory authority over deceptive and false advertising, has expressly found that embedded advertising has no deleterious impact on viewers or listeners.[5]

Rather, product placement is simply one form of commercial support that, as explained in the *NOI/NPRM*, is made available to advertisers by the television industry to sustain free, advertising-supported programming in an age of more sophisticated technology, such as digital video recorders ("DVRs") that permit viewers to skip traditional commercial breaks.[6] Imposition of new, unnecessary, and unduly burdensome sponsorship identification requirements would be disruptive to the television viewing experience, would undermine program popularity, and would drive advertisers to other mediums. Such harms would further depress the already challenged economics of the television industry. Thus, contrary to the claims of certain commenters, not only is there no cognizable basis to support adoption of more rigorous sponsorship identification requirements, but there are significant public interest factors which call for regulatory restraint.

A. Simultaneous Disclosures Are Grossly Excessive and Would Be Distracting to Viewers.

Some commenters recommend "simultaneous disclosure," envisioning a sponsorship identification announcement appearing on screen at the same time that a product placement or product integration occurs within a television program.[7] Several methods of simultaneous

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[5] Letter from Mary K. Engle, Associate Director for Advertising Practices, FTC, to Gary Ruskin, Commercial Alert (Feb. 10, 2005).

[6] *NOI/NPRM* at ¶ 1.

[7] Comments of Commercial Alert ("*Commercial Alert Comments*"), Comments of Center for Media and Democracy at 6 ("*CMD Comments*"), Comments of the Center for Science in the

disclosure were suggested, each of which would be excessive and intrusive to programming and most assuredly would be regarded as an annoying distraction by viewers. These include visual or written disclosures ranging from super-imposed statements like "advertisement" or slow text crawls that appear every time an embedded product is exhibited, mentioned, or even referenced in the program.[8] Some commenters contend that the Commission should require that visual or written disclosures be large in size and employ stylized fonts to stand out prominently.[9] However, no empirical or other evidence is offered to support the need for such announcements, which would certainly not be well received by viewers who are primarily interested in the creative content of programs, not whether Coca Cola may have paid to have a performer consume its soft drink or BMW provided a vehicle to be driven during a movie. In addition, some commenters seek simultaneous, audible disclosures of at least five seconds or longer at the same volume as the program's dialogue.[10] Plainly these proposed requirements, which would provide no new information but would instead offer it at a different time than presently required, would clutter viewers' screens, disrupt program dialogue, undermine program popularity and drive away advertisers. On their face, these ideas make little sense and advance no compelling public interest.

In the past, the Commission has eliminated duplicative sponsorship requirements found to be excessively burdensome, and has rejected various proposals to restrict advertising due to

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Public Interest at 2. ("*CPSI Comments*"), Comments of Writers Guild of America at 2, Comments of Marin Institute at 4 (specifically applied to embedded advertisements for alcoholic products).

[8] *Commercial Alert Comments* at 12-14, Comments of N.E. Marsden at 4, Comments of Writers Guild of America at 2.

[9] *CMD Comments* at 7, *CPSI Comments* at 2.

[10] Comments of the Screen Actor's Guild at 8.

the prospect of reducing advertiser expenditures, which of course fuel free, over-the-air broadcasting.[11] As required under existing regulations, program producers regularly disclose the identity of advertisers who pay for placement of products in programming, typically as part of a program's end credits. There is no evidence suggesting that the public is dissatisfied with this approach to disclosure, which has successfully been deployed for decades, or that the public would welcome the aggressive and intrusive measures that some commenters seek. Simultaneous disclosure requirements would be redundant, unnecessary, and very harmful to the television industry as a whole. These recommendations should therefore be rejected.

B. Disclosures at the Beginning of Programs are Unnecessary.

Many commenters observe that television programs frequently include sponsorship identification announcements at the conclusion of specific programs.[12] Some commenters argue that these disclosures are ineffective because viewers are made aware of embedded advertising only after they have been exposed to the product placement or integration.[13] However, most viewers are well aware that television programs may contain embedded advertising.[14] Further, the sponsorship identification rules have long required that an announcement identifying the sponsor appear at least once at any time during a program and be displayed in a manner which

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[11] *National Media Providers Comments* at 17-18 (citing *e.g. Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 1616 (1992) (eliminating on reconsideration a redundant audio announcement requirement for political sponsorship identification).

[12] *Commercial Alert Comments* at 10.

[13] *Commercial Alert Comments* at 10-12, Comments of N.E. Marsden at 4.

[14] *National Media Providers Comments* at 26-27 (citing *Starcom Study Yields Rules for Print Product Placement*, STARCOM MEDIAVEST, Oct. 10, 2005 which shows that consumers are aware that embedded advertising is a common practice in mass media).

permits the average viewer to read the announcement.[15] The commenters seeking to layer on new regulations conspicuously fail to provide any evidence that the current requirements are ineffective, that viewers have complained that broadcasters' current disclosure practices are inadequate, or that placement of a sponsorship identification announcement at the beginning rather than the end of a program will offer viewers any additional information, insights, or enlightenment. Placing sponsorship identification announcements at the end of a program not only complies fully with the rule, it adequately ensures that interested viewers know where to look for such announcements without creating unnecessary clutter before or during the program. This is particularly the case because the end of a program is where viewers have been conditioned to review such material, and there is no reason to confuse viewers as to where this information is provided by disrupting such decades-old practice.

Some commenters would go to even greater lengths by requiring detailed sponsorship identifications that not only identify the sponsor, but also discuss the nature of the embedded advertising, what products are being advertised, as well as the sponsor's parent entity.[16] The added time it would take to institute these detailed disclosures would cause massive clutter and would truncate the length of actual dramatic or other program content. Moreover, in today's information-rich environment, current disclosures are surely sufficient to make viewers aware of entities sponsoring product placement and integration. Viewers desiring more specific

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[15] 47 C.F.R. § 73.1212(f) ("...only one such announcement need be made anytime during the course of the broadcast"). *See NAB Comments* at 3-4 (tracing the history of sponsorship identification rules back to the Radio Act of 1927), Comments of Group M Worldwide at 1-2 (citing Section 317 and 507 of the Communications Act and 47 C.F.R. §§ 73.1212 and 76.1615), *Commercial Alert Comments* at 10 (noting the current Commission's regulations only require one understandable announcement).

[16] Comments of the Screen Actor's Guild at 8, Comments of the Writers Guild of America at 2 (recommending that the simultaneous disclosure crawl include the parent corporation of the advertised product).

information about identified sponsors (although it is intuitively doubtful that such investigative zeal would exist among many viewers) can obtain a wealth of information from publicly accessible sources, such as a sponsor's corporate website, Yahoo, Google or other Internet search engines. The Commission should not require more detailed disclosures, which will be disruptive and detrimental to viewers who are primarily interested in the content and entertainment value of programming, not detailed factual information about companies which may have embedded advertising within a dramatic or other work.

C. Proposals to Ban Embedded Advertising in General Audience Programming Are Not Supportable.

Some commenters request a blanket embedded advertising ban with respect to *all* television programming airing before 10:00 p.m. on grounds that children might be in the viewing audience.[17] There is absolutely no basis for imposing such a sweeping and paternalistic regulatory restriction. In establishing its children's television rules, the Commission expressly rejected commercial limits in programming produced and broadcast for children over twelve, citing a lack of sufficient empirical evidence for such restrictions.[18] Indeed, as Campaign For A Commercial-Free Childhood ("CFCCC") – one of the proponents of these expansive restrictions – acknowledges, Congress specifically exempted from the children's advertising limits, programming "originally produced for a general or adult audience which may nevertheless be significantly viewed by children."[19] CFCCC concedes that the Commission

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[17] *Commercial Alert Comments* at 29, Comments of Campaign for A Commercial-Free Childhood ("*CFCC Comments*") at 18-20.

[18] *Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd. 2111, 2112 (1991).

[19] CFCC Comments at 23 (citing H.R. REP. 101-385, at 16 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605).

similarly excuses "general audience programming" from advertising limits applicable to programming directed towards children 12 and under.[20] When the FCC adopted the restrictions applicable to programming for children, it pursued a restrained and balanced approach. To treat adult viewers as if they are children would be to abandon the Commission's long held recognition that children *differ* from adults.[21] The Commission should maintain its current practice of imposing advertising limitations only on programming that is actually geared to children and avoid the urge to engage in regulatory excess by prohibiting an important form of advertising in programming where adults comprise the primary target audience. To do otherwise would be arbitrary and capricious and, for reasons discussed at the comment phase, would violate the First Amendment.[22]

One commenter goes so far as to propose a prohibition on embedded advertising between 6:00 a.m. and 10:00 p.m. based on the notion that such advertising is as harmful to children as indecent and profane content.[23] However, there has been no evidence showing that product placement is harmful – it is simply a form of commercial support used to maintain advertising-supporting television in the age of DVRs and other new technologies that limit the effectiveness of traditional commercials. It is irrational to equate embedded advertisements with indecent and profane speech, and it would accordingly be irrational to use a nonsensical premise to restrict embedded advertising.

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[20] CFCC Comments at 23 (citing *Policies and Rules Concerning Children's Television Programming,* Report and Order, 6 FCC Rcd 2111, at ¶3 (1991).

[21] *National Media Providers Comments* at 34. *See Id.,* Section II(C) at 33-35 for an in depth discussion of this issue.

[22] *National Media Providers* Comments, Section III at 43-64.

[23] Comments of Marin Institute at 4-6 (focusing on limitations on alcohol-related embedded advertising).

Further, there is no evidence that product placement occurring during general audience programming features products in which children have any interest. For example, Commercial Alert noted product placements of Nortel phones in *West Wing*, digital ThinkLabs stethoscopes in *ER*, and Hummers and Volvos in *CSI* and *Desperate Housewives*.[24] Obviously, children aged 12 and under would have little interest in these types of decidedly "adult" products or be impacted to any degree by embedded advertising which may promote them.

Some commenters also seek an explicit ban on embedded advertising in all programming that is specifically targeted to children regardless of the time it airs.[25] However, as previously discussed in the *National Media Providers Comments*, the current limits on advertising in children's programming are very particularized, take into account the cognitive limitations of children, and already prohibit most product placement and product integration in children's programming.[26] Additional regulations are unnecessary.

D. Maintaining Lists of Embedded Advertisers Would Require Scarce Resources and Provide No Counterbalancing Benefit.

Some commenters would have the Commission require television broadcasters to maintain a list of all entities sponsoring embedded advertisements in their stations' programming during the prior year, and to make such lists publicly available on their websites and in their public inspection files.[27] Such a burdensome and overly-regulatory approach is unjustified. The policy underlying the sponsorship identification statutory requirements and regulations is that viewers and listeners are entitled to know if a person or entity has paid money or made in-kind

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[24] *See Commercial Alert Comments*, 5.

[25] *CFCC Comments,* Section III at 15-18.

[26] *National Media Providers Comments,* Section II(B)(3) at 30-33 (citing The Children's Television Act, 47 U.S.C. §§ 303a-303c).

[27] *CMD Comments* at 6-8.

contributions for the inclusion of program or commercial matter unless it is self evident based on the nature of the matter provided. Broadcasters comply with this requirement by appropriately disclosing the identity of advertisers. Requiring stations to maintain a list of entities sponsoring embedded advertising is superfluous and would not further the underlying policy goal of the sponsorship identification requirements. Maintaining such a list would simply create a significant added burden on broadcasters without any relevant offsetting benefit to the public.

II. The Commission Lacks Authority to Extend the Sponsorship Identification Rules to Theatrical Films.

Since 1963, theatrical films that are rebroadcast on television have been exempt from the sponsorship identification rules as applied to embedded advertising. Some commenters argue this exemption is outdated, and that the sponsorship identification rules should apply to television broadcasts of theatrical films, because movies regularly contain embedded advertising. These commenters urge the FCC to apply the sponsorship identification rules to all theatrical films shown on television.[28] Congress has never explicitly delegated authority to the Commission to regulate sponsorship identifications in theatrical films and longstanding precedent makes clear that the Commission cannot assert its authority over this issue simply because Congress has not explicitly prohibited the Commission from doing so.[29]

Moreover, even assuming arguendo appropriate assertion of jurisdiction, the Commission should refrain from reversing its 45-year-old precedent. In adopting the exemption, the

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[28] Commercial Alert Comments, Section IV at 26-27, Comments of Marin Institute at 7-8, Comments of N.E. Marsden at 38.

[29] *National Media Providers Comments* at 41 (citing *MPAA v. FCC*, 309 F.3d 796, 805 holding that it is "entirely untenable" that the FCC may adopt rules in a particular area simply "because Congress did not expressly foreclose the possibility"). *See Id.*, Section II(D)(2) at 41-43 for a complete analysis of this issue.

Commission found no indication that the motion picture industry engaged in practices "contrary to the public interest as it relates to broadcasting."[30] Proponents of the repeal of the exemption have provided no evidence that this long-standing determination is no longer valid. As was true in 1963, in the absence of evidence indicating that the rule should be applied to the broadcast of feature films, the Commission should not repeal the exemption as it "might have some disruptive and dislocating economic effects and which might inhibit program production.[31] Moreover, sponsorship identification disclosures, particularly if required to be simultaneous with the placement, would disrupt the artistic integrity of movies and would be highly distracting and unappealing to viewers.[32]

Notwithstanding the 1963 adoption of the exception for feature films, the Commission found that such films could constitute "matter which is intended for broadcasting"[33] under Section 507(b) of the Communications Act of 1934, as amended, based on the perceived tight connection between feature films and their broadcast on television.[34] The rationale for this determination is much less valid today. In 1963, the Commission noted that the "great majority" of feature films produced will be "ultimately" broadcast on television and that "eventual television exhibition of a 'feature' film is a probable and perhaps necessary consequence of its

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[30] *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules,* Report and Order, 34 FCC 829, 841 (1963) (the "Feature Films Order").

[31] *Id., at*, 841 (1963).

[32] Comments of Screen Actors Guild at 9 ("...the Guild fears such 'real-time' disclosure may disrupt the viewing experience and distract from an actor's performance").

[33] *Feature Films Order*, at 841.

[34] 47 U.S.C. 508(b) (the "Communications Act").

production."[35] Indeed, the Commission noted that "[t]he degree to which the motion picture industry is dependent upon television as a market for its product is likewise apparent."[36] According to a study cited by the Commission, 90% of all sound films made in Hollywood would be sold for television broadcast by the end of 1964.[37]

Today, it is substantially less likely that a significant number of feature films will ever be aired by *broadcast* television. Moreover, there is little, if any, evidence that today's motion picture industry is "dependent" upon broadcast television as a significant market. Currently, feature films are distributed through a wide variety of means besides broadcast television, including "cable distribution, Blu-Ray, DVD, Internet distribution, and non-linear MVPD offerings (*e.g.*, video-on-demand ('VOD') and pay-per-view ('PPV'))."[38] As a result, while the Commission may have been able to conclude in 1963 that feature films constituted material intended to be aired on *broadcast* television, the same does not hold true today. Thus, for the Commission to assert jurisdiction over such feature films pursuant to Section 507(b) of the Communications Act currently is far more tenuous than it was in 1963.

At bottom, overturning the long-held exemption would have a seriously negative economic effect on the television industry without any significant offsetting public interest benefit.

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[35] *Id.*, at 838.

[36] *Id.*, at 839.

[37] *Id.*

[38] Comments of Motion Picture Association of America at 4 (stating "motion picture studios often derive substantial revenue from a film without ever showing that film on broadcast television").

III. Conclusion.

Imposition of new, burdensome, intrusive and distracting sponsorship identification requirements would be detrimental to the television industry that is relying to some extent on embedded advertising to respond to increased use of DVRs and other new time shifting technologies, and as a means to sustain free, over-the-air broadcasting. The Commission should refrain from adopting additional sponsorship identification rules or extending the rules to non-broadcast television and theatrical films. It is respectfully submitted that the current sponsorship identification rules sufficiently and appropriately inform viewers of consideration that may be received for inclusion of broadcast material and strike a time tested and correct public interest balance.

Respectfully submitted,

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